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IN THE

Supreme Court of the United States

JAMES SHEPPARD POTTS AND ADAM EMPIE POTTS

Petitioners

v.

J. K. RADER, AS ADMINISTRATOR, ET AL,

Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT OF SAID RESPONSE

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The Respondents, Lisa Guigon Shinberger and three charitable organizations of Richmond, Virginia, namely, Sheltering Arms Hospital, Virginia Home for Incurables, and Protestant Episcopal Church Home for Old Women, respectfully present to the Court this their response to the petition for writ of certiorari herein.

QUESTIONS PRESENTED

Three questions are presented in the petition for writ of certiorari, (1) the alleged abuse of the trial court's discretion in denying Colonel Adam Empie Potts' protection to which he alleges he was entitled under the Soldiers and Sailors Civil Relief Act, 1940; (2) the refusal of the trial

court to recognize certain alleged canons of real estate law prevailing in the State of Arkansas with reference to the devolution of ancestral estates; and, (3) the alleged denial of due process and the equal protection of the law guaranteed to the Petitioner under the Constitution of the United States of America. While the petition asserts three alleged errors, actually only two points are presented and this is recognized in the brief in support of the petition since it is confined to two points; namely, (a) the alleged abuse of discretion of the trial court in refusing Colonel Adam Empie Potts a continuance of the entire proceeding because of his military service; and (b) the question relating to the devolution of ancestral estates in Arkansas.

STATEMENT OF THE CASE

This litigation arose with reference to the Estate of Adam Empie Sheppard who died near Richmond, Virginia in Henrico County on the 29th day of November, 1934, and whose estate is yet unsettled because of various litigation. Litigation was first instituted in the Commonwealth of Virginia by an attack on the will of Adam Empie Sheppard by James Sheppard Potts, Adam Empie Potts and Joseph Schoolfield Potts, three of the nephews of the decedent, Adam Empie Sheppard. In that suit it was also alleged that Adam Empie Sheppard deceased, was largely indebted to the Potts brothers because of Sheppard's alleged mismanagement of several other estates of relatives of the Potts brothers. All of these estates had been handled by Adam Empie Sheppard over a period of more than thirty years before his death. No litigation had been instituted against Adam Empie Sheppard during his lifetime with respect of said estates. That suit was decided adversely to the Potts brothers and was appealed by them

to the Supreme Court of Appeals in Virginia. The Supreme Court of Appeals of Virginia (*Potts* v. *Flippen* 171 Va., 152) affirmed the trial court. Application for a writ of certiorari then was made to the Supreme Court of the United States but certiorari was denied (see *Potts* v. *Flippen* 305 U. S. 662, 59 S. Ct. 364, 83 Law Ed. 429). A rehearing before the Supreme Court of the United States was likewise denied (see 306 U. S. 664, 59 S. Ct. 487, 83 Law Ed. 1062),

The Arkansas litigation with reference to the estate of Adam Empie Sheppard was instituted in October of 1937, and was actively litigated from that time until after the beginning of World War II. It was not until a year and a half after the beginning of the war that Colonel Adam Empie Potts moved the Arkansas Court to stay the action under the Soldiers and Sailors Civil Relief Act of 1940. Theretofore a large part of the evidence had already been taken. At all stages of the controversy both prior to and subsequent to Pearl Harbor, Colonel Adam Empie Potts has been represented by able counsel. In the meantime, one branch of this suit was decided by the trial court and was appealed to the Supreme Court of Arkansas (*Sheltering Arms Hospital* v. *Shinberger,* 201 Ark. 780, 146 S. W. 2d, 921). The trial court as to the motion of Colonel Potts found that he "is and has been at all times during the pendency of the action represented by counsel who has done everything necessary and proper in the defense of any and all right of the said Adam Empie Potts, and that the interest of the said Adam Empie Potts would not be prejudiced in any way by permitting this action to proceed and that the Soldiers and Sailors Relief Act is therefore inapplicable to the facts of this case." This decision was appealed to the Supreme Court of Arkansas and was decided adversely to the Potts brothers (*James Sheppard Potts and Adam Empie Potts* v. *J. K.*

Rader, Administrator, et al, 219 S. W. 2d, 769 (advance sheet No. 4, May 4, 1949). A writ of certiorari is here being sought with reference to this last mentioned case. Thus, approximately fifteen (15) years after the death of Adam Empie Sheppard, his estate is still unsettled and approximately four (4) years subsequent to the termination of hostilities in World War II, Colonel Potts is still trying to obtain an extension of time.

We do not believe it will serve any useful purpose to reiterate the entire background of this litigation since it is fully set forth in the Motion to Dismiss under Rule Five of the Arkansas Supreme Court. This motion to which we respectfully refer the court is set out in full on pages 169 to 182 of the supplement to the record in this case.

BRIEF IN SUPPORT OF RESPONSE

We will discuss only the two points which are discussed in the brief of petitioners in support of petition for writ of certiorari.

(a) Soldiers and Sailors Civil Relief Act.

We respectfully refer this Honorable Court to the opinion of the Supreme Court of the State of Arkansas, set forth in full on pages 184, 187 of the record in this case. In that opinion the Supreme Court of Arkansas points out that Colonel Potts had been in the regular army for many years prior to the World War II and prior to the filing of this suit. By his own admission, Colonel Potts relied completely upon his brother, James Sheppard Potts to attend to all matters pertaining to the Arkansas property. The brother, James Sheppard Potts, is an eminent and able lawyer. In 1939, Colonel Potts joined in a verified motion for a continuance of the Arkansas case upon the ground

that his brother, James Sheppard Potts alone, was informed as to the details of this case and that James Sheppard Potts was then too ill to appear as a witness. In that motion, Colonel Potts' lack of familiarity with the details of this case was stressed. It is difficult to see, if the affidavit is true, how Colonel Potts would have been of any value in the defense of the suit. It is recited in the opinion of the Supreme Court of Arkansas that there was no showing of any kind to indicate that the military service of Colonel Potts in any manner impaired his ability to defend the suit. We respectfully submit that there is not yet any showing of any kind which might indicate that Colonel Potts was in any manner hampered in the defense of the suit by his military service. He was represented by able counsel (his brother and other counsel in Arkansas) throughout every stage of the controversy.

In *Boone* v. *Lightner,* 319 U. S. 561, this Honorable Court held that the mere fact of a litigant being engaged in military service was not sufficient to require the trial court to continue litigation in which such soldier might be involved.

> "It seems now to be universally held that this section does not grant a person in military service immunity from the trial of actions against him unless in the Court's opinion the defendant's ability to conduct his defense is materially and adversely affected by his military service. Among the cases so holding is *Glick Cleaning and Laundry Co.* v. *Wade,* 206 Ark. 8, 172 SW 2d 929.
>
> "The act may not be invoked to delay or defeat the orderly or expeditious trial of valid suits. *Brown Service Insurance Co.* v. *King,* 247 Ala. 311, 24 So. 2d 219. *Ridley* v. *Young,* 64 Cal. App. 2d 503, 149 P. 2d 76.
>
> "In determining whether one in the military service

is entitled to a stay of proceedings, the nature of the action and the applicant's relation to it, his knowledge of the matters involved as affecting the necessity of his presence at the trial for adequate protection of his rights, his lack of diligence in protecting his rights, or failure to obtain leave to be present at the trial, when such leave might have been obtained, may be considered. *Semlar* v. *Ortwig,* 234 Iowa 233, 12 NW 2d 265.

"The Soldiers' and Sailors' Civil Relief Act does not contemplate conferring upon a soldier or sailor any privilege not enjoyed by a civilian but is merely intended to secure him in his legal rights until he may return and defend himself. *Tolmas* v. *Streiffer,* (La) 21 So. 2d 387.

"The act is not to be employed as a vehicle of oppression or invoked for a needless purpose, but is to be administered as an instrument to accomplish substantial justice. *Hunt* v. *Jacobson,* 33 NYS 2d 661, 178 Misc. 201.

"The act was not intended to give complete immunity from claims arising as a result of civil life and activities, and the provision should not be used as a sword to the detriment of the rights of others rather than a shield. *Isaacs* v. *Isaacs,* 37 NYS 2d 527. It was not intended to be used as a means of abuse. *Kelly* v. *Kelly,* 38 Misc. 2d, 344. The act should not be treated as a blanket moratorium on all litigation affecting servicemen. *David* v. *Brown,* 46 D. & C. 123. *Lawther* v. *Lawther,* 53 D. & C. 280."

The interest of Colonel Potts in this litigation is identical with that of his two brothers, both of whom are parties to this litigation. The interests and views of Colonel Potts have been presented fully and ably. We cannot think of a single contention, sound or unsound, which might have been advanced in addition to those heretofore presented on behalf of Colonel Potts and his brothers, and none have been suggested in the record or in the briefs. The estate is

being rapidly dissipated in costs of litigation. If it continues a shell only will remain. The substance will be gone.

(b) PETITIONERS CLAIM TO OWNERSHIP OF ENTIRE PLANTATION

If we correctly understand the contention of the Petitioners with reference to the ownership of the plantation in question, it is that the plantation, being ancestral property, must remain in family ownership. (For how long, we do not know). James Sheppard, the ancester, died in 1870, his will directed that the plantation be sold and that "my two executors are to unite and concur in the sale of my property in the State of Arkansas". The proceeds were then to be paid to the widow and children of the decedent. One of the executors was a resident of Virginia, and the other was a resident of Arkansas. James Sheppard left surviving him, a widow and four children. Instead of carrying out the direction of the will as to the sale of the plantation, the Arkansas executor deeded the property to the widow and four children. Whether or not this was done with the concurrence of the Virginia Executor is not now known. The four children were Annie E. Sheppard, Adam Empie Sheppard, Belle G. Sheppard and Katie E. Sheppard, Jr. Katie E. Sheppard, Sr. was the widow of the deceased. Annie E. Sheppard one of the children, married one Lurty and then died intestate and without issue. Katie E. Sheppard, Jr. married A. B. Guigon and died leaving one son surviving, namely, A. B. Guigon, Jr. Belle G. Sheppard married Joseph Schoolfield Potts, Sr., the mother of the three Potts brothers, two of whom are presenting the petition for writ of certiorari. Belle Sheppard Potts died in 1930 intestate leaving three sons surviving. The last surviving child of James Sheppard was Adam E. Sheppard who died November 29, 1934 tes-

tate, but without issue. A. B. Guigon, Jr. the son of Katie E. Sheppard, Jr. (Guigon) survived the said Adam Empie Sheppard, but died October 4, 1936. Thus upon the death of Adam Empie Sheppard, there remained alive four grandsons of the said James Sheppard, the ancestor. Each of these grandsons at that time stood in identical relationship to James Sheppard, namely, grandsons. Thus if the doctrine of ancestral property were applied to the plantation and all intervening wills disregarded, the three Potts brothers and Guigon would have become the owners of Sheppard Island Plantation upon the death of Adam Empie Sheppard. After the death of Guigon, the Potts brothers now claim that by some hocus pocus [redacted] the entire plantation is owned by the Potts brothers, although A. B. Guigon, Jr. devised his interest therein to his half sister, Lisa Guigon Shinberger. To follow the reasoning of the Petitioners, it would be impossible for an ancestral estate ever to be disposed of by will or devise by any heir to that estate. Manifestly, this cannot be the meaning of the Arkansas statute. We assume that if two of the Potts brothers should die then applying the same reasoning the third Potts brother would claim the entire property. What course that property would follow upon the death of the third Potts brother is exceedingly obscure.

The Supreme Court of the State of Arkansas considered this question under the laws of the State of Arkansas and in its opinion clearly disposes of this contention. It held in the first place that the property was not intended by the ancestor to be ancestral property, since by his will he expressly ordered its sale. It then pointed out that the property having been treated by all of the heirs of James Sheppard as the property of the four children of James Sheppard, (his widow having subsequently died), that it is too late now for the Potts brothers, three of the four grandsons, to assert that the property did not follow the course which all of the

children of James Sheppard considered that it did follow after the death of James Sheppard, and the conveyance of it by one of his executors.

In the brief in support of the petition, (pages 27 and 28) the ancestral property statute of Arkansas is discussed. The Statute does not justify the conclusion urged by petitioners and the Supreme Court of Arkansas so found. *Webb* v. *Cardwell,* 128 S. W. 2d, 691 122 A.L.R. 814 cited on page 27 of said brief does not in any manner sustain the contention.

The will of James Sheppard required his executors to sell the plantation but expressly provided that the proceeds from such sale should be paid over by the executors to the testator's widow and four children. The widow and the four children were the sole beneficiaries of the trust. In such a situation the beneficiaries of the said trust had the right to elect that the plantation be conveyed to them jointly without sale, and upon such election, it was the duty of the said executors to so convey it in lieu of selling the same.

In *Wooster* v. *Cooper,* et al, 59 N. J. Eq. 204, 45 Atl. 381, a decedent's will ordered his executors to sell certain real and personal property and to pay the proceeds to specified persons. The New Jersey Court in discussing the rights of the beneficiaries said:

> "The beneficiaries all appear, and, for the reasons stated, join with the complainant, Isaac Cooper, in electing to take the farm by conveyance, as land, rather than the proceeds of sale by division among them. There has been, as yet, no conversion under the power of sale. They all take the same shares, the same interest, by the same mode. No discretion is by the power given to the trustee, nor does the exercise of an election by the beneficiaries to take the farm as land appear to conflict with any purpose of the donor in making his

gift to them. In such cases equity will permit the beneficiaries to take the land, and will direct a conveyance to be made to them by the donees of the power, according to their respective shares. Craig v. Leslie, 3 Wheat. 578, 4 L. Ed. 460; Morse v. Bank, 47 N. J. Eq. 285, 20 Atl. 961, 12 L.R.A. 62."

In *Craig* v. *Leslie,* 3 Wheat. 578, 4 L. Ed. 460, the Supreme Court of the United States considered a similar question and in the head note to that case it is said:

"Equity considers land, directed in wills, or other instruments, to be sold and converted into money, as money; and money directed to be employed in the purchase of land, as land.

"Where the whole beneficial interest in the land or money, thus directed to be employed, belongs to the person for whose use it is given, a court of equity will permit the *cestui que trust* to take the money or the land at his election, if he elect before the conversion is made."

In discussing this question the court says:

"Thus where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust,* but will permit him to take the money or the land, if he elects to do so before the conversion has actually been made; *and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity.* It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest." (Italics supplied)

See also *Moore* v. *Barnard* 75 Colo. 395, 226 P. 134, *Prentice* v. *Janssen* 79 N. Y. 478 (aff. 14 Hun. 548) and *Sydnor* v. *Palmer* 29 Wis. 226, where it was said that such conveyance may be made to the beneficiaries with their assent or subject to their future ratification. The widow and all children elected to take or ratified the taking of the land in lieu of the proceeds from its sale, and held title to and possession of that land so long as each of them lived, the last one dying approximately sixty years after the election.

It is contended by the Petitioners that since the deed conveying the plantation to the Sheppard widow and children was executed by only one of the Trustees named in the will, that it was ineffectual to convey title since the will required the exercise of the joint judgment of both executors. Such a contention is without merit. The election of the beneficiaries to take the land instead of the proceeds of sale, relieved the executors of the need for exercising any judgment whatever. Thus, although the deed being executed by only one executor was defective yet the holding of said property for more than sixty years without question by anyone indicates clearly that neither executor objected to the method of handling the plantation and, thus, the court of equity properly supplied the defect.

A similar question was before the Supreme Court of Appeals in Virginia in the case *of Roberts' Widow and Heirs* v. *Stanton*, 2 Munf. (Va.) 129, where the Supreme Court of Virginia said:

> "A number of authorities have been cited to show that, although equity will not supply the non-execution of a power, yet it will supply any defect in the execution of a power, provided the same be for a good or valuable consideration. In the case before us, the trust or power was imperfectly executed; the conveyance of the land in question having been executed

> by one trustee only, instead of three; but it being for a valuable consideration, a court of equity may, I conceive, with propriety, supply the defect; so far, at least, as respects the appellants, who (we all agree) have no right to the land in controversy."

In *Brown* v. *Doherty*, 185 N. Y. 383, 78 N. E. 147, two executors were directed by will to sell real estate; the sale actually took place, but only one executor executed a deed. The New York Court very promptly corrected the defect, holding that equity would consider that as done which should have been done.

In the instant case, upon the election of the beneficaries to take the land rather than the proceeds, it became the duty of both executors to execute a deed to them. If only one performed his duty the other one could not defeat the wishes and election of the beneficiaries by refusing to do so. Equity will supply the defect.

CONCLUSION

We respectfully submit that the conclusions of the petitioner in its brief are not sound. The will of James Sheppard did not evidence any intention that the plantation should be kept in his family as ancestral property. It indicated exactly the opposite, since he directed that it be sold and the proceeds be paid to his widow and children as personalty.

The deed conveying the property, although executed by only one of the executors, should not now affect the title thereto since the defect has been cured by a court of equity.

No real reason has been advanced for granting certiorari on the ground that Colonel Adam Empie Potts is in the military service. He has received a fair trial and has been

fully and ably represented by eminent counsel at all stages of this controversy.

We respectfully urge that certiorari be not granted.

Respectfully submitted,

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